Supreme Court, U. S.
FILED
NOV 14 1978
MICHAEL RODAK, JR., CLERK

No. 78-178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ARCHIBALD MAULDING AND HARRY D. RIMBEY,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONERS' REPLY MEMORANDUM

A. RAYMOND RANDOLPH, JR.
SHARP, RANDOLPH & JANIS
1220 Nineteenth Street, N.W.
Suite 401
Washington, D.C. 20036

PATRICK V. REILLY
SORLING, NORTHRUP, HANNA, CULLEN AND COCHRAN, LTD.
820 Illinois Building
Springfield, Illinois 62701

Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-178

ARCHIBALD MAULDING AND HARRY D. RIMBEY,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONERS' REPLY MEMORANDUM

---

1. The government evidently agrees that it would be error for a court to instruct that a corporate officer acts "willfully" within the meaning of Section 6672 when he should have known, but did not know, that withholding taxes had not been paid.[1] But that is the standard embodied in the jury instruction the government now supports in this Court. The district court

---

[1] See Memorandum for the United States in Opposition, at p. 4, discussing *Kalb* v. *United States*, 505 F.2d 506 (2d Cir. 1974), *cert. denied*, 421 U.S. 979 (1975).

below charged that petitioners acted "willfully" if they failed to investigate facts that "would have disclosed" the unpaid taxes.[2] This is a "should have known" standard and the jury must have understood it as such. No amount of tergiversation can transform the instruction upheld here into a proper definition of "willfully," which the government told this Court last Term "refers [in Section 6672] *only* to a voluntary and conscious decision to prefer other creditors."[3]

2. The government says that *Bishop* v. *United States*, 412 U.S. 346 (1973), was a criminal case and therefore is not controlling.[4] But this is quite unresponsive to the argument in our Petition (pp. 13-15) that if, as *Bishop* holds, careless or reckless conduct does not equal willful conduct under the felony counterpart of Section 6672 (18 U.S.C. § 7202), there is no basis for a different interpretation of the identical language in Section 6672. On that score the government is silent. It offers no reasons why Congress would have used the same words to convey different meanings and, we submit, there are none.

[2] The instruction is set forth at p. 7 of our Petition. It contrasts sharply with the statement in *Kalb* v. *United States*, *supra*, 505 F.2d at 511, that "Willful conduct also includes failure to investigate or to correct mismanagement *after having notice that withholding taxes have not been remitted to the government*" (emphasis added).

[3] Brief for the United States in *United States* v. *Sotelo*, 436 U.S. 268 (1978), at p. 28 n. 19 (emphasis added).

[4] Memorandum for the United States in Opposition, at p. 5 n. 3.

3. Section 6672 is, as we discussed in our Petition (pp. 9-10), one of the most frequently litigated provisions of the Internal Revenue Code and the proper interpretation of "willfully" as used in that statute is a recurring and important issue. This case presents the issue as clearly and crisply as any case that can be imagined.[5] It is an issue that should be settled by this Court, not only because of the conflicting decisions of the lower courts,[6] but also because the lingering uncertainty over the meaning of "willfully" in Section 6672 promises to breed much unnecessary litigation as the government attempts to press its erroneous interpretation in the district courts and the court of appeals.

[5] The only issue presented to the jury was whether petitioners acted "willfully" (see our Petition, at p. 6) and the facts of the case are clear. (However, we should point out that although the government states in its Memorandum in Opposition, at p. 2, that petitioners were aware of the poor financial condition of Pine and Company during the last three quarters of 1968, the record reflects only that in late 1968 petitioner Rimbey became aware that the company had financial difficulties because of mounting receivables (A151).)

[6] See our Petition, at pp.11-12. The government has chosen not to address our arguments why the decision below conflicts with the decisions of other courts of appeals and why the opinion in *Kalb* v. *United States*, *supra*, properly understood, does not support the notion that carelessness or even recklessness can establish the deliberate and intentional conduct comprehended by willfulness.

For the foregoing reasons and the reasons stated in our Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. RAYMOND RANDOLPH, JR.
SHARP, RANDOLPH & JANIS
1220 Nineteenth Street, N.W.
Suite 401
Washington, D.C. 20036
(202) 659-2400

PATRICK V. REILLY
SORLING, NORTHRUP, HANNA, CULLEN AND COCHRAN, LTD.
820 Illinois Building
Springfield, Illinois 62701
(217) 544-1144

Attorneys for Petitioners.

NOVEMBER 1978.